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IN THE

Supreme Court of the United States

October Term, 1952

No. 759

VIRGINIA SKOVGAARD, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioner, Virginia Skovgaard, by her counsel of record, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on February 5, 1953.

OPINIONS BELOW

The District Court did not render an opinion. The opinion of the Court of Appeals is set forth at pages 88-92 of the record. It has not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1953. (R. 94) This petition is filed within ninety days from the date of the judgment. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS INVOLVED

1. Whether the United States District Court for the District of Columbia had jurisdiction of petitioner's cause of action.

2. Whether Harvey Andrew Skovgaard was totally disabled at the time that he made application for National Service Life Insurance on January 29, 1947, and whether this issue was one of fact for the jury.

STATUTES INVOLVED

Title 38 of the U. S. Code,

Section 817—

In the event of a disagreement as to claim arising under this chapter, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to United States Government (converted) life insurance under the provisions of sections 445 and 551 of this title, as amended: Provided, That in any such suit the decision of the Administrator, as to waiver or non-waiver of premiums under section 802(n), shall be conclusive and binding on the court. Oct. 8, 1940, 11 p.m. E.S.T., c. 757, Title VI, Part I, 617, 54 Stat. 1014.

Title 38 of the U. S. Code,

Section 817 (as amended)—

In the event of disagreement as to any claim arising under this chapter, suit may be brought in the same manner and subject to the same conditions and

limitations as are applicable to the United States Government life (converted) insurance under the provisions of sections 445 and 551 of this title. As amended July 11, 1942, c. 504, 6, 56 Stat. 659; Aug. 1, 1946, c. 728, 14, 60 Stat. 788.

Title 38 U.S.C.

Section 802(c)(2) provides, among other things that: "* * * any individual who has had active service between October 8, 1940 and September 2, 1945, both dates inclusive, shall be granted such insurance upon application therefor in writing and upon payment or authorization for deduction of premiums and evidence satisfactory to the Administrator showing such person to be in good health at the time of such application. In any case in which application for life or disability insurance or for reinstatement of such insurance is made prior to January 1, 1950, the Administrator shall not deny, for the purposes of this Section or Sections 803-805, 806-818 of this title, that the applicant is in good health because of any disability or disabilities, less than total in degree, resulting from or aggravated by such active service. * * *" (Emphasis supplied)

Title 38 U.S.C.

Section 445—

In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the district court of the United States for the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28, and section 765 of Title 28 so far as applicable. * * *.

Title 38 U.S.C.

Section 808—
The Administrator, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this chapter, shall have power to make such rules and regulations, not inconsistent with the provisions of this chapter, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder. All officers and employees of the Veterans' Administration shall perform such duties in connection with the administration of this chapter as may be assigned to them by the Administrator. All official acts performed by such officers and employees designated therefor by the Administrator shall have the same force and effect as though performed by the Administrator. Except in the event of suit as provided in section 817 of this title, or other appropriate court proceedings, all decisions rendered by the Administrator under the provisions of this chapter, or regulations properly issued pursuant thereto, shall be final and conclusive on all questions of law or fact, and no other official of the United States, except a judge or judges of United States courts, shall have jurisdiction to review any such decisions. As amended Aug. 1, 1945, c. 728, Sec. 12, 60 Stat. 788.

STATEMENT OF FACTS

The petitioner, Virginia Skovgaard, is the widow of the late Harvey Skovgaard and brings this suit under the provisions of the National Service Life Insurance Act. Harvey Skovgaard enlisted in the United States Navy on July 16, 1940, and was honorably discharged on April 28, 1945. While in the Naval service he contracted Nephritis as the result of his service. All of his disabilities were service connected, and on January 29, 1947 he was rated 30% disabled on account of his disabilities. At the time he was rated 30% disabled to wit: January 29, 1947, he applied to the Veterans Administration for

additional insurance of $9000.00 under the National Service Life Insurance Act.

This application was made in accordance with an amendment to the National Service Life Insurance Act of August 1, 1946, which provided among other things that if an application for additional insurance was made prior to January 1, 1950 by a service man or woman who served between October 8, 1940, and September 2, 1945, and was suffering from disabilities less than total in character, such application must be granted by the Administrator of Veterans' Affairs.

The veteran, Harvey Skovgaard, served between October 8, 1940, and September 2, 1945, and all of his disabilities were service connected. Premiums sufficient to keep the policy applied for in force were paid.

Harvey Skovgaard complied with each and every condition sufficient to meet the requirements of the amendatory Act of August 1, 1946. The Court will bear in mind that on the date that he submitted the application he was held to be less than totally disabled. This rating was never broken or destroyed during his lifetime by the Veterans Administration, and in fact today his rating on all of his disabilities for compensation purposes on the date that he submitted the application for $9000.00 of insurance is less than a total disability.

Harvey Skovgaard died on May 6, 1947. At the time of his death his application for the $9000.00 additional insurance had not been acted upon by the Veterans Administration, although it is admitted that it was filed on January 29, 1947. On June 25, 1947, the Veterans Administration rejected the application of Harvey Skovgaard, and contended that he was totally disabled at the time that he submitted the application for insurance. This finding was made despite the fact that during the insured's lifetime no such rating had ever been made, and

the highest rating finally made on the date of the application for insurance on January 29, 1947 was 60% disabled.

The petitioner contends that Harvey Skovgaard complied with each and every requirement of the statute entitling him to insurance.

The amendment to the National Service Life Insurance Act of August 1, 1946 increased the jurisdiction of the District Court to cover all claims arising under the National Service Life Insurance Act. The petitioner contends that Harvey Skovgaard was insured under the National Service Life Insurance Act at the time of his death because of the compliance with each and every condition entitling him to be insured, and if there was any issue of fact as to whether he was on January 29, 1947 totally disabled, that this issue was for the jury.

The District Court (Judge Keech) directed a verdict for the government at the close of the case. In so doing, the Court overruled the decision of Judge Letts of the District Court who had ruled on the jurisdictional question in favor of the petitioner. The Court of Appeals split on the jurisdictional question. Two Judges, Edgerton and Bazelon holding that the District Court had no jurisdiction over the cause of action, and Judge Miller in a dissenting opinion held that there was jurisdiction but that the evidence showed Skovgaard to be totally disabled based upon the report of the physician making the examination which was attached to the application for insurance.

The petitioner contends that the District Court did have jurisdiction of the cause of action, and that the two Judges who ruled otherwise completely ignored the statutes granting such jurisdiction, and the issue of whether Harvey Skovgaard was totally disabled on January 29, 1947 was one for the jury inasmuch as the Veterans

Administration other than the insurance board had rated him 30% disabled on the date of the application, and never more than 60% disabled on that date. That the issue of fact was for determination in the same manner as hundreds, indeed if not thousands, of other cases involving total disability, and permanent and total disability have been tried since the time the government first insured service men and women over the past thirty years.

REASONS FOR GRANTING THE WRIT

The petitioner asserts that this application for a writ of certiorari is made in accordance with Subdivision (b) of Par. 5 of Rule 38 in that the Court of Appeals for the District of Columbia Circuit has decided an important question of Federal law which has not been, but should be, settled by this court.

There are no decisions of any of the U. S. Courts of Appeal for the other Circuits construing the statutes in question in this case.

The petitioner concedes that prior to the amendment of the National Service Life Insurance Act of Aug. 1, 1946 that the petitioner had no cause of action, but on Aug. 1, 1946 the statutes authorizing suits to be brought under the National Service Life Insurance Act were modified by Congress of the United States so as to authorize suits on any claims arising under the chapter. The amendment on which the petitioner relies was also enacted on Aug. 1, 1946.

Title 38 U.S.C. Section 802(c)(2) was enacted on Aug. 1, 1946. It provided that any individual who served in the active service between October 8, 1940, and September 2, 1945 shall be granted insurance, and if the application was made before Jan. 1, 1950 by any individual suffering from a disability service-connected less than total in

character the insurance shall be granted. Harvey Skovgaard who made the application for insurance on Jan. 29, 1947 met every requirement of this amendatory Act. He served between the dates specified. He made his application before January 1, 1950 and all of his disabilities were service-connected, and on the date of his application he was 30% disabled. He paid the necessary premium. Nevertheless, the Veterans Administration, on June 25, 1947, after the death of Harvey Skovgaard, refused to grant the insurance. The petitioner contends that Harvey Skovgaard, having met each and every requirement entitling him to the granting of insurance, such insurance was automatically granted even though no policy was ever issued, and that the Veterans Administration after his death could not destroy the insurance benefits granted to Harvey Skovgaard.

Title 38 U.S.C. Section 817 of the original National Service Life Insurance Act provided that in the event of a disagreement as to claim arising under the chapter, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to suits on U. S. Government (converted) life insurance under Title 38 U.S.C. 445. This section of the original Act provided that the decision of the Administrator, as to waiver or non-waiver of premiums under Section 802(n), shall be conclusive and binding on the court. On Aug. 1, 1946 Section 817 was amended so as to insert the word "any" before the words "claim arising under this chapter", and also the provision as to the decision of the Administrator, as to waiver or non-waiver of premiums under Section 802(n), was stricken from the Act. This amendment was made by Congress for the reason that it was believed that any individual who made any sort of a claim under the National Service Life Insurance Act should be entitled to litigate that claim in the courts and particular reference was made to the right to litigate

the question as to whether or not the insured was entitled to a waiver of insurance premiums under Section 802(n). The opinion of the majority of the U. S. Court of Appeals below totally ignored the fact that the Aug. 1, 1946 amendment, above referred to, inserted the word "any" before the word "claim", showing that a suit could be brought on any claim arising under the Act. The majority opinion in the Court below decided the law of this case as if there had been no amendment on Aug. 1, 1946, and if there had been no amendment, the decision of the majority of the Court below would have been correct, but the petitioner certainly had a claim under the National Service Life Insurance Act on which she had a right to litigate in the courts, and the dissenting opinion of Circuit Judge Miller of the Court below, as to the right to file suit and as to the jurisdiction of the District Court over the petitioner's claim, is the only proper decision which could have been made based upon a proper construction of the statute. The majority opinion completely ignores the fact that the statute was amended on Aug. 1, 1946, and in fact, holds that the fact that the statute was amended did not change the jurisdiction of the Court. The jurisdiction remained the same regardless of the amendment.

This Court has held that the provisions of the National Service Life Insurance Act should be liberally construed to effectuate the beneficial purposes that Congress had in mind.

United States v. *Zazove,* 334 U. S. 602, 610

This Court also construed the words "any claim" in the case of *United States* v. *Yellow Cab Co.,* 340 U.S. 543, 95 L.Ed. 523 to mean that they are broad words in common usage that are not words of art, and embrace any claim that may well fall within the Federal Tort Claims Act.

This Court should bear in mind that we are not merely dealing with an ordinary commercial contract. Congress made the offer to insure veterans who suffered as a result of their service-connected disabilities. This offer was extended to veterans who were disabled as a result of their service because of their inability to obtain ordinary commercial insurance. The offer was limited to a very restricted class of veterans who, in fact, had service-connected disabilities. The United States was responsible for those disabilities on account of the services performed by the veterans. It is not necessary, under this Aug. 1, 1946 amendment, that a policy issue. The situation is identical with the provision of the War Risk Insurance Act enacted on Oct. 6, 1917. All that was necessary in that case to obtain insurance was to make the application therefor. Physical condition was unimportant under the statute, and even death-bed applications were recognized.

The petitioner insists the amendment of Aug. 1, 1946, on which she relies, is analogous to application for insurance made under the War Risk Insurance Act.

When this suit was first filed in the District Court for the District of Columbia, a motion was made to dismiss the claim on the grounds that the Court was without jurisdiction. This motion came on for hearing before District Judge Letts who ruled that the Court did have jurisdiction over the suit of the petitioner. No District Judge of the United States has had more experience in suits on governmental insurance than Judge Letts, and his ruling in the matter should be very persuasive authority.

The question in this case is one of statutory construction. The majority of the Court of Appeals below construed the amendment of Aug. 1, 1946 as not enlarging the jurisdiction of the District Court. This opinion and decision is in utter defiance of the language of the statute.

The only proper construction on the statute is contained in the dissenting opinion of Circuit Judge Miller.

In the dissenting opinion of Circuit Judge Miller, he states that the judgment below should be affirmed because he finds that the evidence shows that Harvey Skovgaard, the applicant for insurance, was totally disabled on Jan. 29, 1947. This is on the basis of the examination by a doctor accompanying the application, but in so concluding, Circuit Judge Miller overlooked the fact that the other evidence in the case showed that Harvey Skovgaard was not totally disabled. In the first place, he was only rated 30% disabled on all his disabilities by the Veterans Administration on Jan. 29, 1947, and the other evidence by lay witnesses of his activity on that date, and prior thereto, showing that on Jan. 29, 1947 he was not totally disabled. This was an issue of fact for the jury based on all the evidence of the case and not on the single medical report attached to the application for insurance. In fact, the Veterans Administration themselves have never rated him during his lifetime more than 60% disabled on Jan. 29, 1947. The question was entirely one of fact for the jury, and there was an issue of fact in this regard.

Berry v *United States,* 312 U.S. 450, 85 L.Ed. 945

This Court in *United States* v *Spaulding,* 293 U.S. 498 held that chronic nephritis was not a total disability.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 759

VIRGINIA SKOVGAARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was written by the District Court for the District of Columbia. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 88–93) is reported at 202 F. 2d 363.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1953 (R. 94). The petition for a writ of certiorari was filed April 30, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether an applicant for National Service Life Insurance who has been denied a policy because of failure to present evidence satisfactory to the Administrator of Veterans' Affairs showing him to be in good health at the time of application may (a) sue the United States in the district court as if a contract of insurance had been entered into and breached, and (b) introduce evidence of good health never presented to the Administrator as support for the claim that a policy should have been issued.

STATUTES INVOLVED

Section 617 of the National Service Life Insurance Act of 1940, 54 Stat. 1014, as amended, 60 Stat. 788–789 (38 U. S. C. 817), provides:

> In the event of disagreement as to any claim arising under this Act, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to the United States Government life (converted) insurance under the provisions of sections 19 and 500[1] of the World War Veterans' Act, 1924, as amended.

Section 602 (c) (2) of the National Service Life Insurance Act, as amended by Section 2 of

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[1] Section 500 of the World War Veterans' Act, 1924, 38 U. S. C. 551, restricts attorneys in presenting insurance claims but contains no authorization for suit.

the Act of August 1, 1946, 60 Stat. 781 (38 U. S. C. 802 (c) (2)), provides in pertinent part as follows:

> * * * any individual who has had active service between October 8, 1940, and September 2, 1945, both dates inclusive, shall be granted such insurance upon application therefor in writing and upon payment or authorization for deduction of premiums and evidence satisfactory to the Administrator showing such person to be in good health at the time of such application. In any case in which application for life or disability insurance or for reinstatement of such insurance is made prior to January 1, 1950, the Administrator shall not deny, for the purposes of this or any other section of this part, that the applicant is in good health because of any disability or disabilities, less than total in degree, resulting from or aggravated by such active service. * * *

Section 19 of the World War Veterans' Act, Act of June 7, 1924, 43 Stat. 612, as amended by Section 4 of the Act of July 3, 1930, 46 Stat. 992 (38 U. S. C. 445), provides in pertinent part as follows:

> In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the

> United States either in the district court of the United States for the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 5 and 6 of the Act entitled "An Act to provide for the bringing of suits against the Government of the United States," approved March 3, 1887, and section 10 thereof so far as applicable. * * *

Section 608 of the National Service Life Insurance Act, 54 Stat. 1012, as amended by Section 12 of the Act of August 1, 1946, 60 Stat. 788 (38 U. S. C. 808), provides:

> The Administrator, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, shall have power to make such rules and regulations, not inconsistent with the provisions of this Act, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder. All officers and employees of the Veterans' Administration shall perform such duties in connection with the administration of this Act as may be assigned to them by the Administrator. All official acts performed by such officers and employees designated therefor by the Administrator shall have the same force

and effect as though performed by the Administrator. Except in the event of suit as provided in section 617 hereof, or other appropriate court proceedings, all decisions rendered by the Administrator under the provisions of this Act, or regulations properly issued pursuant thereto, shall be final and conclusive on all questions of law or fact, and no other official of the United States, except a judge or judges of the United States courts, shall have jurisdiction to review any such decisions.

STATEMENT

Harvey Skovgaard served in the United States Navy from July 16, 1940, until April 28, 1945, when he was discharged because of chronic nephritis. While in the service he applied for and was granted $1,000 life insurance under the National Service Life Insurance Act of 1940. On January 29, 1947, he filed, under Section 602 (c) (2) of the National Service Life Insurance Act (*supra,* pp. 2–3), a written application for insurance in the additional sum of $9,000, the remainder of the maximum protection permitted, and tendered two months premium thereon.

On February 11, 1947, he entered a government hospital as an ambulatory patient. His application for additional insurance had not been formally acted upon when he died on May 6, 1947; it was administratively denied on June 25, 1947, on the ground that he was not in good health and

was totally disabled at the time the application was filed (R. 8, 42).

His widow, as beneficiary, filed suit against the United States to recover $9,000, alleging that her husband had automatically been granted the additional insurance. A motion to dismiss the complaint for want of consent to suit was denied (R. 5–6). A subsequent motion to strike the allegations of the complaint that Skovgaard was rated by the Veterans' Administration as less than totally disabled (for service connected disability) [2] was sustained by the same judge on the ground that such ratings were for compensation purposes and were unrelated to a National Service Life Insurance policy claim (R. 10–12), whereupon the complaint was amended to eliminate the allegations as to the ratings for compensation purposes (R. 12–14). After petitioner's evidence was in, the district court found that there was no contract of insurance under Section 602 (a) (2) in effect at the time of Skovgaard's death on which to base a claim and held that "An action against the United States under Section 817 [of Title 38, USC, *supra,* p. 2] is not a proceeding in which the Administrator's exercise

[2] Section 602 (c) (2) (*supra*, pp. 2–3), on which petitioner bases her claim, provides that the Administrator shall not deny that an applicant (who applies prior to January 1, 1950) is in good health "because of any disability or disabilities, less than total in degree, resulting from or aggravated by such active service."

of discretion in rejecting the application may be reviewed" (R. 86). The court directed a verdict for the Government, stating "I am passing on the record as a whole. I am saying, on the law and evidence before me, I do not believe that the plaintiff in this case is entitled to prevail" (R. 87).[3]

On appeal, the majority of the Court of Appeals, in an opinion by Judge Edgerton, held that the Government had consented to suit only as to claims under a contract of insurance and the district court was without jurisdiction of a claim, as here, not based on an existing contract of insurance. Judge Miller, dissenting, agreed that petitioner was not entitled to recover; but held that petitioner had failed to present evidence, satisfactory to the Administrator, that Skovgaard was in good health at the time of application and "the case turns on the sufficiency of proof submitted to the Administrator" (R. 93).

ARGUMENT

Petitioner asserts that the United States has consented to suit in the district court in cases in which the Administrator erroneously refused to issue a policy of insurance under Section 602 (c) (2). But petitioner cannot successfully

[3] Contrary to petitioner's statement (Pet. 6), the directed verdict did not overrule the decision on the jurisdictional motion; it specified that no contract was proved (R. 86–87) and was based on the law and evidence.

assail the interpretation of the Court of Appeals that the incorporation of the conditions and limitations of Section 19 of the World War Veterans' Act, 1924 (38 U. S. C. 445) (*supra*, pp. 3–4) in the consent to suit conferred by Section 617 of the N. S. L. I. Act (*supra*, p. 2) imported the earlier statute's limitation of suability to claims under an *existing contract of insurance*.[4] Other courts have reached the same conclusion. *Ginelli* v. *United States*, 94 F. Supp. 874 (D. Mass.); *Schilling* v. *United States*, 101 F. Supp. 525 (E. D. Mich.); cf. *Meadows* v. *United States*, 281 U. S. 271; *Burlingham* v. *United States*, 34 F. 2d 881 (C. A. 8); *Taft* v. *United States*, 127 F. 2d 876 (C. A. 2); *United States* v. *Fitch*, 185 F. 2d

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[4] The repeal by implication said to have been effected by the August 1, 1946, amendment, changing the terms of Section 617 of the N. S. L. I. Act (Pet. 8–9), has no foundation. To permit suit on an insurance policy implied in law would require apt words.

Petitioner herself (Pet. 8–9) proves that the 1946 amendment to Section 617 (*supra*, p. 2), changing "claim" to "any claim", was to reflect the change whereby questions of waiver or non-waiver of premiums under a policy were no longer to be withheld from judicial review. The committee reports stress the congressional belief that judicial review should be authorized when contractual rights and benefits under insurance policies are denied. S. Rep. 1705, 79th Cong., 2d sess., pp. 9, 10; H. Rep. 2002, 79th Cong., 2d sess., pp. 10, 11. There was no concern with judicial review in the absence of a contractual relationship. Cf. *United States* v. *Zazove*, 334 U. S. 602, 611–12. In the face of this legislative history, expressions as to the effect of "any" in other statutory contexts (see *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 548) are not persuasive.

471 (C. A. 10); *Mitchell* v. *United States,* 111 F. Supp. 104 (D. N. J.). *Contra: Unger* v. *United States,* 79 F. Supp. 281 (E. D. Ill.); compare *Gamez* v. *United States,* 95 F. Supp. 656, 660 (S. D. Texas) (under Section 602 (c) (3)). Petitioner in suing on a refusal to issue a policy does not claim either on an insurance policy in effect or on one agreed to be issued. Cf. *United States* v. *Leahy,* 148 F. 2d 462, 466 (C. A. 3). She has not proved or attempted to prove that an insurance policy was issued or that the Administrator was satisfied by what the application showed. The district court was, therefore, without jurisdiction of her suit.

But even if consent to suit on a nonconsensual contract might be implied where the Administrator should have been satisfied that applicant was in good health, petitioner still would have no prospect of success in this suit, since recovery would have to be denied on other adequate grounds. Although the Administrator is admonished not to deny the good health of an applicant with disabilities less than total in degree, resulting from or aggravated by active service between October 8, 1940, and September 2, 1945, the Act clearly requires that the evidence satisfy him of applicant's good health at the time of the application. Cf. *Tagg Bros.* v. *United States,* 280 U. S. 420, 444; *Bayly* v. *United States,* 99 C. Cls. 598, 605–6; *Lanier* v. *New York Life Ins. Co.,* 88 F. 2d 196, 198–9 (C. A. 5), certiorari denied,

301 U. S. 693. It is not enough that a *jury* or a *court* subsequently be satisfied that the applicant was not totally disabled.[5] If reviewable at all, the Administrator's denial must be reviewed in the light of the evidence presented to him. His discretion cannot be upset on the strength of evidence he never saw.

Petitioner does not attempt to show that the Administrator should have been satisfied on the basis of Skovgaard's application and the materials presented with the application.[6] Instead, she

[5] *Berry* v. *United States*, 312 U. S. 450, involved the question whether there was sufficient evidence to sustain the jury verdict that the insured claimant had become totally and permanently disabled while his war risk insurance was in effect. No provision requiring that the Administrator be satisfied of the insured's disability was involved.

[6] The complaint does not allege arbitrary or capricious action, or bad faith (R. 12–13). Cf. *Dismuke* v. *United States*, 297 U. S. 167, 172–3; *Byrne* v. *United States*, 97 C. Cls. 412, 423; 3 Williston, *Contracts*, Rev. Ed. 1936, § 675A. Petitioner's counsel expressly denied that any abuse of the Administrator's discretion had to be shown (R. 81–82). He took the position that the Administrator's denial was without significance. "You have to go to him first to get your disagreement; and if he denies the claim, you have the right to go into court * * *. This amendment was put in so that the thing could be cut wide-open, because the Act states, under 'any claim'" (R. 82). Petitioner reads out of the statute the requirements that suit be on a policy of insurance and that good health be proved to the satisfaction of the Administrator by evidence accompanying the application. She reads into the Act that she is entitled to go outside the application, to rely on ratings for other purposes, to have a trial *de novo* (R. 38–40), and to require the Government to prove that a rating of total disability was made in the lifetime of the applicant.

relied in the courts below on a rating for compensation purposes[7] and now relies on what a jury could find therefrom. It is beside the point to insist that during the insured's lifetime no rating of total disability had been made (Pet. 5, R. 36–37). Unless petitioner is to be relieved from proving conditions precedent to insurance liability, she must at least show that the applicant presented to the Administrator evidence showing he was in good health at the time of his application.[8] The only proof of Skovgaard's good health which petitioner introduced at the trial was that "he filed the report of a medical examination

[7] The compensation ratings are made under other provisions (38 U. S. C. 471, 477). They were based on other and different evidence relating to health at earlier times, and were appraised by different standards. It has long been settled that such ratings are inadmissible to prove the extent of disability for insurance purposes. *Demeter* v. *United States*, 66 F. 2d 188 (C. A. D. C.); *United States* v. *Thomas*, 53 F. 2d 192, 195 (C. A. 4); *Lockett* v. *United States*, 86 F. 2d 1 (C. A. 5); *Magenton* v. *United States*, 75 F. 2d 410, 412 (C. A. 8); *United States* v. *Golden*, 34 F. 2d 367, 369–70 (C. A. 10); *Rose* v. *United States*, 70 F. 2d 68 (C. A. 10); *Guihan* v. *United States*, 110 F. Supp. 738 (E. D. N. Y.).

[8] The ratings for compensation purposes may have been too unfavorable to Skovgaard by taking his disabilities too lightly. If they were, that is hardly a reason for substituting insurance benefits and certainly no basis for an estoppel against the United States. *Wilber National Bank* v. *United States*, 294 U. S. 120; *Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380; *James* v. *United States*, 185 F. 2d 115 (C. A. 4); *McDaniel* v. *United States*, 196 F. 2d 291 (C. A. 5); *United States* v. *Fitch*, 185 F. 2d 471 (C. A. 10). Skovgaard tried to obtain total disability (R. 72).

made January 28, 1947, which disclosed chronic nephritis, albuminuria plus 4, a heart murmur and arteriosclerosis, and which contained no expression of opinion by the examiner as to whether the applicant was then partially or wholly disabled by his ailments" (R. 71–72, 93). *United States* v. *Spaulding,* 293 U. S. 498, cited at Pet. 11, is no authority for the proposition that chronic nephritis, standing by itself, may never disable, and the applicant did not present any other evidence showing that he was not totally disabled.

In the circumstances of this case the only question is whether the complaint should have been dismissed for lack of jurisdiction, or for failure to state a claim upon which relief might be granted, or whether judgment should have been entered for the Government for failure of proof. A different decision from that of the majority below on the jurisdictional issue would not affect the outcome.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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